SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1966

NO. 360

MITSUBISHI SHIPPING COMPANY, *Petitioner,*

v.

LOUIS MILLS, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LEROY DENMAN MOODY,
1600 Esperson Building,
Houston, Texas 77002

B. D. McKINNEY,
1600 Esperson Building,
Houston, Texas 77002

Attorneys for Petitioner

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on March 16, 1966.

CITATIONS TO OPINIONS BELOW

The District Court did not write an opinion. Its judgment appears at page 516 of the Record. The opinion of the Court of Appeals in *Mills v. Mitsubishi Shipping Company* appears at 358 F.2d 609 and is printed in Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on March 16, 1966. R. 539. Rehearing was denied on April 20, 1966. R. 572. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. When a jury has observed the witnesses, heard conflicting testimony supporting different views and found a winch seaworthy, may a Court of Appeals substitute its own contrary determination that the winch was unseaworthy, based on pictures of some other, unidentified winch?

2. Does the Seventh Amendment protect defendants, or does it just protect plaintiffs?

CONSTITUTIONAL PROVISION INVOLVED

Amendments — Article VII. In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise examined in any court of the United States, than according to the rules of the common law.

STATEMENT

Respondent, a longshoreman, was hurt while operating a winch on petitioner's ship, and sued for damages, based on diversity of citizenship. Respondent lost his case in the trial court after the jury heard the testimony of thirteen live witnesses and the depositions of four others.

Respondent and his witnesses all denied that any of the pictures "sponsored" by petitioner were pictures of the

winch in question. Mechanical details of the winch in the pictures could have been used to cross-examine and impeach the respondent and his friends, had they admitted the accuracy of the pictures. The jury considered their obvious reasons for denying the pictures as it noted their squirmings, perspirings and evasiveness when they were confronted with the pictures, and found the winch seaworthy.

Then, the Court of Appeals, after less than an hour of observing counsel in oral argument and an undetermined period of reflection in chambers, made a substitute fact finding that the winch was unseaworthy, based on the very pictures respondent cringed from and denied in the presence of the jury.[1]

Respondent first claimed that a handle on the winch hit him because a cotter pin or key came out of the lower end of the handle. (R. 76, 77). Petitioner had no knowledge of such an incident, and disputed respondent's story at the trial. After much conflicting evidence, the jury found, among other things that Mills was injured by "being knocked or jerked by a winch handle,"[2] but that the winch was seaworthy and that petitioner had not failed in its duty to provide a reasonably safe place to work. (R. 484-488).

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[1] And we mean it. If this seems to be an advocate's overstatement, the few pages in Appendix B will demonstrate that the Court of Appeals would have been better aided in making its fact findings by pictures of the witnesses observed by the jury.

[2] This question was so phrased because respondent virtually abandoned his claim that he was hit by the handle as a result of impeachment, and feared that an inquiry in terms of his initial testimony would have resulted in a negative answer even on this issue.

The only part of Mills' story accepted by the jury was his claim that he was hurt, and not much of that. This was partly because of general impeachment and partly because of numerous items of specific impeachment. Respondent misrepresented his recent earnings by one-third (compare R. 248-9 with R. 417) and concealed numerous other disabling injuries including an incident after this one when a four-by-four was dropped from a boom onto the portion of his body injured on petitioner's ship. (R. 121-141).

Respondent's story of his difficulty with the winch varied. He told one story to his timekeeper (R. 119-DX-1), another detailed version to the compensation carrier, (R. 369-370), still another on deposition, and an entirely different one at the trial. Respondent told the jury that the winch would only power the cable drum or reel in one direction, and that the only means of controlling this power was through use of the lever in question, which he told the jury was a brake. (R. 64, 66, 72, 73). The Court of Appeals found the lever was not a brake!

On deposition he said the lever was a *gear*, and that he was trying to stop the load by cutting off the steam with a *different control* at the time he was hurt. (R. 151, 154, 155). At the trial, he stated that shutting off the steam had no braking effect.

He sometimes admitted and sometimes denied that there was a foot brake on the winch (e.g. R. 156, 157, v. R. 148, 152).

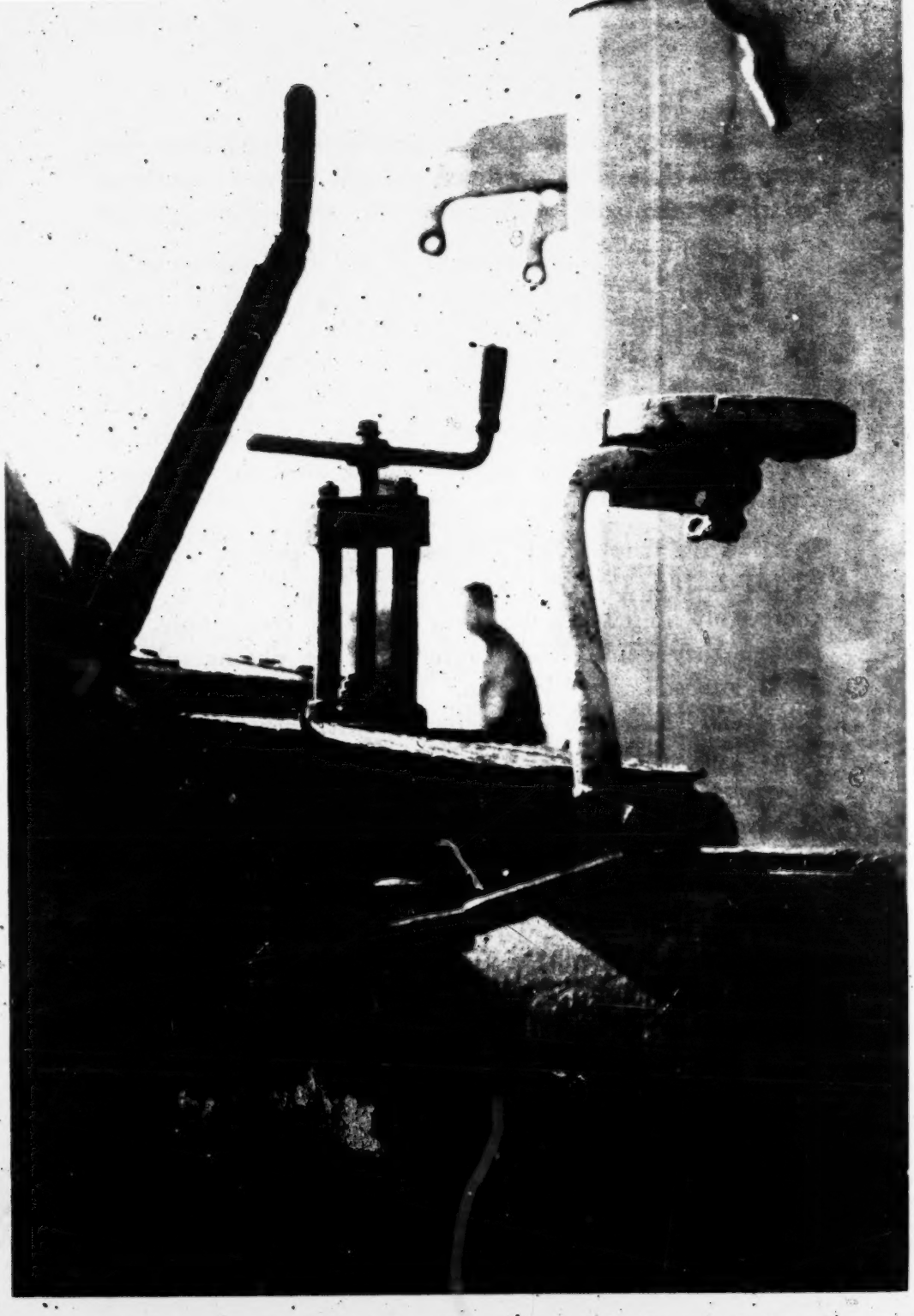
Mills' trial version of how the winch worked was disputed by his own witnesses (R. 166-167, 176-177, 178, 198).

Respondent and his friends claimed that Japanese men supervised by officers of the ship stood by and hammered on the winch with a sledgehammer after this occurred.

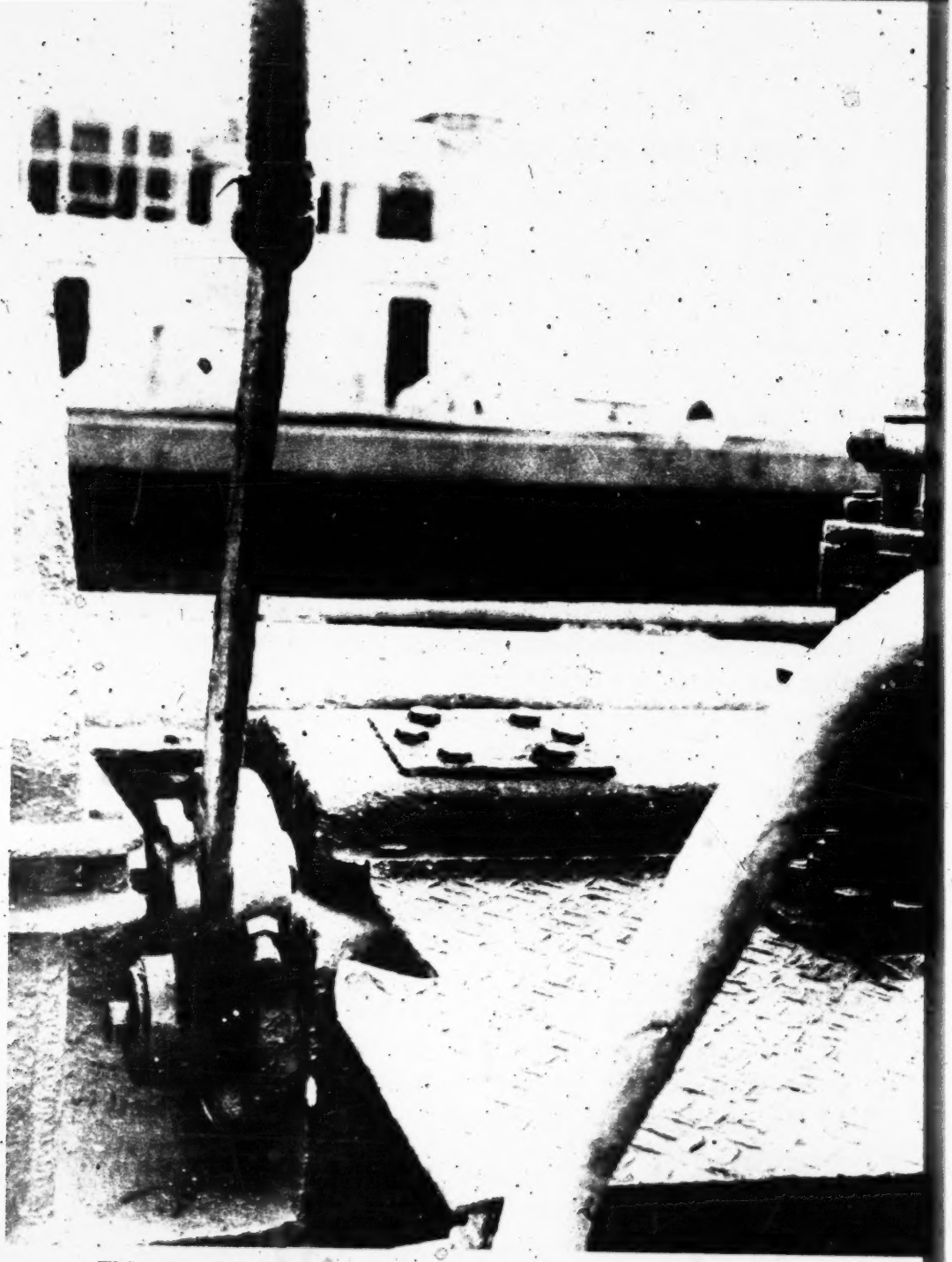
However, deposition testimony of the ship's officers established that the incident was not reported to the third officer, who was on duty at the time (R. 263, 264, 383), the sailors in the area (R. 384) the master (R. 276, 277) or the chief officer (R. 281-283). Mills continued to work and his *injury* was apparently not brought to the attention even of the stevedoring superintendent until the following day. (R. 345).

All Mills' supporting witnesses (old cronies of his—R. 161-2, 186, 190, 201, 203, 214-8, 221, 226, 233) were thoroughly impeached on their damages contentions, although they denied the accuracy of the photographs to avoid impeachment by them. They claimed Mills' wages had greatly decreased in comparison with other longshoremen. The entire port payroll was put in evidence and showed that this had no more substance than Mills' tale of how the winch was operated. (R. 173-5, 192, 205, 206, 220, 224, 244 in contrast with R. 399, 412, 421-422).

The Court's description of the manner in which the winch was operated was denied in detail by respondent. See Appendix "B".



Here is one of the pictures (DX 3) relied on by the Court of Appeals in its re-examination of the disputed facts. Respondent said of this picture, "That don't look like the winch I was on." (R. 145)



This one (DX 11) is typical of the pictures respondent and his friends all dodged because they didn't want to be questioned in detail about the key or just where the alleged sledge hammer banging was done. Respondent's counsel obtained a ruling that none of the pictures accurately portrayed the winch in question. (R. 149-150, 378-380).

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' decision in this case is in conflict with this Court's decision in *Atlantic & Gulf Stevedores, Inc.. v. Ellerman Lines, Ltd.*, 369 U.S. 355 (1962). The Court of Appeals is in collision with the Seventh Amendment. In searching for a possible view of the case to make the jury's findings seem inconsistent, the Court of Appeals ignored these wellfounded views which are consistent with the jury's findings:

(a) Since Mills attempted to mislead the jury about the proper method of operating the winch and about other things, it could believe or disbelieve any of his testimony. The jury did not believe any of Mills' testimony except his claim that he was hurt. The jury definitely did not find that any cotter key or pin came out. This was disputed and there was evidence to the contray. The real fallacy in the opinion is its assumption that a finding of injury meant the jury adopted Mills' story in toto, in spite of its concession that "Mills' credibility was badly shaken."

(b) The injury was caused neither by unseaworthiness nor the negligence of anyone, including Mills. The fact that Mills did not know how to operate the winch did not mean he was negligent. A child, permitted to operate an airplane, might crash it, through ignorance, although using all the care at his command. If Mills was telling the truth about how he thought the winch was to be operated, he was in an analogous position.

(c) Mills, if not falsifying, was admittedly not using the winch in the proper, intended, normal, expected manner.

(d) Other views and combinations exist.

The Court of Appeals' independent fact findings included assumptions that the lever lost a key, that the lever shook so violently that the operator was thrown off the seat, could not control the load, that this happened more than once, and a lot of other things that are not even implied in the jury's findings. In order to make its principal fact finding and these subsidiary fact findings, the Court of Appeals had to disregard the following pertinent considerations available to the jury:

(1) The credibility of the witnesses and their appearance. The court must have assumed that Mills, while speaking like Lucifer, looked like Gabriel.

(2) The testimony of stevedore walking foreman Lee Hutton, with regard to the proper method of operation and use of the winch.

(3) The deposition testimony of the captain and third officer, to the effect that there was no work done on the winch, no accident was reported to them, and in general, denying all aspects of the claim made by respondent.

(4) The fact that although Mills was supposed to be "sprawled on the deck", stevedore superintendent Gadnitch did not know he was injured until the following day and gang foreman Starke, did not even consider the matter sufficient to require investigation.

(5) The impeaching testimony of Mr. Brannon who demonstrated that all respondent's witnesses but Starke and Gadnitch attempted to mislead the jury on a damages question in an apparent conspiracy to obtain a totally unjustified sum of money, based on false testimony.

(6) The ship's logs.

(7) The signed statement on the timekeeper's report.

(8) The statement given the compensation adjuster by Mills.

(9) The summary of Mills' recent wages and all his other earnings records.

(10) Mills' statement to Dr. Adriance.

(11) Mills demonstrated unreliability as underlined by his concealment of both prior and subsequent injuries of real consequence.

(12) Even the pictures, and the fact that the witnesses refused to be cross-examined about the alleged difficulties with the winch by means of them. Since all this business about the cotter key, the vibration, and all that, was a total fabrication, the witnesses knew they could not stand up to being required to specifically label what occurred, for fear of scientific demonstration of the impossibility of their tale.

2. The decision of the Court below conflicts with the decision in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). The Court of Appeals said, in effect that petitioner had to furnish respondent an accident-free ship and that a winch which played a role in hurting him was, as a matter of law, unseaworthy. Worse, it held that respondent's *version* of the accident made it unseaworthy as a matter of law, even though his version was discredited, and other, more reasonable explanations existed.

3. The decision of the Court of Appeals is in conflict with this court's decision in *Harris v. Pennsylvania Railroad*, 361 U.S. 15 (1959) and the numerous similar cases cited in Mr. Justice Douglas' concurring opinion. In fact,

none of the 16 cases discussed there which were summarily reversed presented a more compelling case for summary action, than this one, where the Court of Appeals has had to factually explain petitioner's winch by speculating about pictures denied to be accurate by respondent and refused admission in evidence before the jury as photos of the winch because of respondent's denial. This is such a clear violation of the right to jury trial that Mr. Justice Frankfurter would have agreed that the court's action went beyond "meaningful judicial supervision over jury verdicts."

4. What's sauce for the goose is sauce for the gander.

5. The court's decision is in conflict with the decision of the United States Court of Appeals for the First Circuit in *Logan v. Empresa Lineas Maritimas Argentinas*, 353 F.2d 373 (1965), cert. den. 383 U.S. 970. The *Logan* case, if decided in accordance with the holding of the Fifth Circuit in the instant case, would necessarily have held that the fact that a hatchboard fell out from under Logan made it unseaworthy as a matter of law, and judgment would have been rendered for Logan on that theory, inasmuch as the jury found as explicitly as it did here that an appurtenance of the vessel caused, or played some role in injury, and that the plaintiff was free of fault, as was the plaintiff here. These recent opposing opinions cannot be reconciled.

6. The court's opinion in this case is in conflict with its own opinion in *Jefferson v. Taiyo Katun, K.K.*, (5 Cir. 1962), cert. den. 372 U.S. 967. In that case, a jury found that a dunnage board broke, but was not unseaworthy. In the instant case, the court attempted to distinguish the Jefferson case because there was language in the Jefferson case to the effect that it is "a rare case where the issue of

unseaworthiness as the proximate cause of an injury is to be resolved for or against a shipowner as a matter of law." The italic are those of the court in the *Mills* opinion, not of the petitioner, nor of the court in its *Jefferson* opinion. The irony of the court's attempt to distinguish the Jefferson case on the proximate cause notion is that the Jefferson case was a dead ringer for this one, in that the jury did not answer a question concerning proximate cause because it did not reach it, having determined no unseaworthiness. Exactly the same thing occurred here, but further in this case, the jury specifically found that *no unseaworthiness of any kind proximately caused the injury* in answer to Question No. 13. (R. 482, 488)

7. The facts stated in the opinion plainly contradict the record in the trial court. All this is summed up in a short extract in Appendix "B". No lay or expert description was made of the pictures. If Mills had testified to the Court of Appeals' description of the pictures, he would have certainly lost his case, and he knew it. The Court of Appeals has so far departed from accepted and usual judicial proceedings that it violated the Seventh Amendment.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted. This is a case which merits summary reversal.

LEROY DENMAN MOODY,
1600 Esperson Building,
Houston, Texas 77002

B. D. MCKINNEY,
1600 Esperson Building,
Houston, Texas 77002

Attorneys for Petitioner

July 15, 1966

APPENDIX "A"

(The Court of Appeals' Opinion, Judgment and Order Denying Rehearing.)

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22,045

LOUIS MILLS, *Appellant,*
versus
MITSUBISHI SHIPPING COMPANY, *Appellee.*

Appeal from the United States District Court for the Southern District of Texas.

(March 16, 1966.)

Before BROWN and COLEMAN, Circuit Judges, and MORGAN, District Judge.

BROWN, Circuit Judge: Another of the frequent longshoreman personal-injury damage claims against the vessel for unseaworthiness, this case reflects again the great utility of special interrogatories with a general charge under F.R.Civ.P. 49(a).[1] The serious question here is whether

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[1] We have but recently commented on this in American Oil Co. v. Hart, 5 Cir., 1966, ... F.2d ....., ... [No. 21972,

there was unseaworthiness as a matter of law. Concluding, as we do, that the specific jury finding of seaworthiness cannot be sustained, we are able to bring this case to an end without the waste of another trial. This is because the trial Court carefully constructed a charge with special interrogatories which would resolve the fact issues and thus enable that Court—or now the Appellate Court—by determining the legal significance thereof, to translate the verdict into the appropriate judgment. Had this all been wrapped up in the enigma of a general verdict for the defendant, no one would have been able to divine what—or how many—defensive theories the jury adopted. But as it is, the jury specifically found that plaintiff Mills was injured by the winch handle,[2] and that this caused identifiable money damages.[3] Since nothing else remains in

Feb. 8, 1966, pp. 3-4]:

> "By the use of interrogatories as a part of, and in conjunction with, a general charge, F.R.Civ.P. 49(a), a procedural device often having much appeal as the trial Court exercises its discretion in the choice of the manner of jury submission especially in complex areas of multiple claims-multiple parties, and the like, we know precisely what the jury found."

See, e.g., Vandercook & Son, Inc. v. Thorpe, 5 Cir., 1965, 344 F.2d 930, 931 n.2; E. L. Cheeney Co. v. Gates, 5 Cir., 1965, 346 F.2d 197, 200, 204-05, 205 n.4; Page v. St. Louis Southwestern Ry., 5 Cir., 1965, 349 F.2d 880, 824 n.12; Nesmith v. Alford, 5 Cir., 1963, 318 F.2d 110, 125 n.30, cert. denied, 1964, 375 U.S. 975, 84 S.Ct. 489, 11 L.Ed.2d 420; Duke v. Sun Oil Co., 5 Cir., 1963, 320 F.2d 853, 865 n.19, on petition for rehearing, 323 F.2d 518, 519; Tugwell v. A. F. Klaveness & Co., 5 Cir., 1963, 320 F.2d 866, 868 n.2 (extensive list of cases cited), cert. denied, 1964, 376 U.S. 951, 84 S.Ct. 967, 11 L.Ed.2d 970.

2 **"Question No. 1:**

Do you find * * * that the plaintiff, Louis Mills, was injured by his being knocked or jerked by a winch handle on the SS VIRGINIA MARU, on November 30, 1961?

ANSWER: **We do."**

3 **"Question No. 8:**

What amount of money * * * do you find * * * will

dispute,[4] we reverse with directions to enter judgment.

The setting may be briefly sketched. At the time of the injury the plaintiff Mills was engaged as a longshoreman in loading cotton on the defendant's S.S. VIRGINIA MARU. As usual, he was employed by an independent contracting stevedore.

Mills was operating the high-boom winch. There were, as usual, two winches located on deck for this hatch. The inshore winch served the outrigger boom which was rigged so that it extended over the shipside to pick up cargo from the wharf. The second winch served the high boom, the top of which was over the square of the hatch. The sling of cargo was first lifted vertically by the outrigger winch until it cleared the ship's rail at which time the high-boom winch took in on the cargo fall to pull the cargo sling up and over the hatch. On receiving the proper signal, the operator of the high-boom winch lowered the cargo into the hold.

Although the shipowner seeks to insulate the jury verdict from critical scrutiny by emphasizing the confusion in the testimony of Mills and other non-seagoing witnesses in the description of the winches, its own evidence—and especially the photographs it sponsored and introduced—makes the mechanical setup clear.

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fairly and reasonably compensate the plaintiff Mills for the injuries sustained by him on November 30, 1961?

You will answer by stating the amount in dollars and cents.

ANSWER: $4,000.00."

[4] The jury's answers exculpated the shipowner of negligence and the plaintiff Mills of contributory negligence. As we point out later, the finding of unavoidable accident falls with our determination of unseaworthiness.

The high-boom winch was steam powered. The operator, sitting on a wooden seat behind the winch, faced the hatch. The steam control valve was located on the operator's right, and it was actuated by rotating the horizontal bar handle to raise or lower the vertical screw valve stem. The control lever was on the operator's left. This lever was vertical and could be shifted in an arc forward and aft. The function of the lever was to engage and disengage the gears of the winch to select the direction in which the winch drum was to revolve. At its lower end the lever was, of course, connected to the gear mechanism.

Because there was simply no evidence that the winch was being improperly operated and, indeed, Mills was exonerated from charges of negligence (see note 4, *supra*), we think the exact sequence of operational steps is not significant. In executing this integrated movement of the cargo sling through two planes by means of the sequential and sometime simultaneous movement of both winches, the operator of the high-boom winch did several things. To lift and haul the sling up and over the hatch, the operator, using his right hand, opened the steam valve and with his left hand pushed the gear level forward. When the load reached the desired height over the hatch, the lever was pulled back and the steam closed off. To lower, apparently the steam remained off and the lever was moved forward. The speed of the descending sling load could be altered by the use of a nearby foot brake or by opening the steam, or both.

Although Mills' credibility was badly shaken as to the exact mechanism of the bodily injuries, their disabling consequence, and the extent of his money loss, the fact of

the occurrence—as the shipowner categorically concedes—is judicially established. (See notes 2 and 7, *supra.*) More than that, it was established without substantial contradiction from the testimony of numerous persons having the status of disinterested witnesses.

On Mills' testimony this was his version. He had taken a sling of three bales of cotton from the inshore winch and had squared them over the hatch. When he closed off the steam to lower them into the hold, the load immediately fell. At the same time he was jerked forward off the seat by the sudden movement of the brake lever which he had in his left hand. In attempting to pull the lever back, he was struck three or four times on the neck and chest by the lever as it whipped back and forth.[5] The lever in some way made two sharp cuts in the chest area of the sweat shirt he was wearing. Mills ended up sprawled on the deck.

This occurrence was corroborated in several ways. Fellow longshoremen in the lower hold, naturally apprehensive when the three bales of cotton came crashing down, went topside, some in time to see that Mills had been injured and some in time to see the ship's crew working on the winch. Lee Hutton, the walking foreman near the hatch, was positive that he saw the load drop. Moreover, he immediately tried to operate the winch to ascertain the trouble. In so doing the lever also jerked and struck him in the shoulder though he suffered no serious injury. This testimony as to the occurrence was not eradicated by the unsuccessful efforts on cross-examination to get Hutton to equate this jerking with normal vibration of the lever

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[5] The shipowner introduced into evidence a statement by Mills to a compensation insurance claims investigator that the lever did not strike his shoulder but only strained it.

handle,[6] nor by the impeachment as to the lever striking him.[7]

More important, the cause of the malfunction was soon discovered. Gardner, operating the outrigger winch, saw Mills fall back and exclaim about being hurt. After a member of the ship's crew was summoned, Gardner found

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[6] "Q. All of these handles vibrate some?

"A. To a certain extent. Depends on how old the winch is. Some of them will do that when you turn the steam on. It shakes you just like that from turning the steam on. You have to hold it like that.

"Q. What you are saying is that this was an unusual thing, it was really going back and forth.

"A. Oh yes."

[7] He earlier testified:

"Q. * * * Did you say that the lever actually hit you or just moved in your hand?

"A. It hit me. I had my hand on the lever and I turned that steam on and I couldn't hold it after I turned the steam on, and it was just like that quick. When you turn that steam on, the lever would go just like that."

After Hutton denied that he had told "people before that it didn't actually hit * * * [me] on the shoulder, but that it went back and forth a great deal in * * * [my] hand and * * * [I] had to turn it loose," the shipowner introduced Hutton's statement presumably given to an investigator. In it he made no mention of being struck by the lever on his shoulder but said "* * * I turned the steam on and the lever jerked and I couldn't hold it."

Of course, we recognize that the shipowner's introduction of prior inconsistent statements by Mills (note 5, supra) and Hutton for impeachment purposes could have permitted the jury to reject all or part of the testimony of these witnesses. This could have included that relating to the occurrence itself, the asserted deficiencies in the winch, its operation, etc. So our holding does not imply that the trial Court erred in jury submission as to all such matters. But our view of this case must necessarily be from the post-verdict standpoint of the trial Judge ruling on Mills' motion for judgment n.o.v., and the jury having found that Mills was injured by his being knocked or jerked by the winch handle (notes 2 and 3, supra), such pre-verdict questions of credibility were washed out.

a cotter key. Within a short time a work party from the ship's crew began working on the winch. By use of heavy hammers and other tools, this key was re-seated. However, it came out again and the repair crew redid the job. All of this we regard as established beyond question. The most that can be read into the deposition testimony of the Japanese Master, chief officer, and third mate is that they had no recollection of any such occurrence being reported or repair work being done.[8]

We think that the uncontradicted testimony showing the missing key, the replacement of it, the malfunction when it slipped out again, the second replacement of the key, and the untoward operation of the winch thereafter all adds up to failure from an identifiable cause of ship's gear during normal expected operations. But the result is the same even if, for want of adequate connecting evidence, the key is disregarded as the causative factor. In either case, the winch while under normal, expected use, with no proof that it was either being mishandled, abused or operated improperly, failed to perform the function for which it existed.

This is the classic case of unseaworthiness, a concept which has been phrased in a number of ways. Thus, in a marine insurance situation we stated: "Of course, a defect in machinery or a defect in a hull means that the vessel is thereby unseaworthy since, with such defect, the machinery or hull, cannot comply with the classic definition of 'reasonably suitable' for the purposes intended." *Tropical Marine Prod., Inc. v. Birmingham Fire Ins. Co.*, 5 Cir.,

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8 The deposition revealed that an oiler is on deck for winch servicing and repairs, and that the work would be done by the oiler under the supervision of an engineer officer. No deposition of either, even if taken, were offered.

1957, 247 F.2d 116, 120, 1957 AMC 1946, 1953. In a death-injury situation we spelled it out in terms of matching operating proficiency against anticipated operating conditions:

> "The subsidiary questions leading to ultimate conclusion of seaworthiness are therefore: what is the vessel to do? What are the hazards, the perils, the forces likely to be incurred? Is the vessel or the particular fitting under scrutiny, sufficient to withstand those anticipated forces? If the answer is in the affirmative, the vessel (or its fitting) is seaworthy. If the answer is in the negative, then the vessel (or the fitting) is unseaworthy no matter how diligent, careful, or prudent the owner might have been. Mitchell v. Trawler Racer, Inc., 1960, 362 U.S. 539, 80 S.Ct. 926, 4 L.Ed.2d 941, 1960 AMC 1503." *Walker v. Harris,* 5 Cir., 1964, 335 F.2d 185, 191, 1964 AMC 1759, 1766, cert. denied, 379 U.S. 130, 85 S.Ct. 326, 13 L.Ed.2d 342.

Along the same line is *Ferrante v. Swedish Am. Lines,* 3 Cir., 1964, 331 F.2d 571, 576, 1964 AMC 2268, 2277, cert. dism'd, 379 U.S. 801, 85 S.Ct. 10, 13 L.Ed.2d 20. So, too, is the Supreme Court's recent reiteration in a *Ryan* indemnity situation of the principle that the "shipowner is liable to the employees of the stevedore company as well as its employees for failing to supply a vessel and equipment free from defects." *Italia Societa v. Oregon Stevedoring Co.,* 1964, 376 U.S. 315, 324, 84 S.Ct. 748, 754, 11 L.Ed.2d 732, 740, 1964 AMC 1075, 1083.

Of course, *Trawler Racer* disclaims any purpose "* * * to suggest that the owner is obligated to furnish an accident-free ship." Rather, the Court goes on to emphasize:

> "The duty is absolute, but it is a duty only to furnish

> a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service." *Mitchell v. Trawler Racer, Inc.*, 1960, 362 U.S. 539, 550, 80 S.Ct. 926, . . . , 4 L.Ed.2d 941, 948, 1960 AMC 1503, 1512-13.

But under no stretch of the imagination is a winch with shift lever reasonably fit if, at a critical point in the handling of the draft, the lever shakes so violently that the operator is thrown off the seat, is injured, cannot control the load, or all three. Nor is this nascent unseaworthiness extinguished by suggesting, as the shipowner does, that with the lever suddenly jerking, the operator might have overcome the consequences by use of the foot brake, turning the steam on, or both.[9] For behind the absolute duty to furnish a seaworthy ship and appliances is the law's policy that the way to avoid injury from misjudgment in the *in extremis* response is to eliminate the deficiencies which give rise to such emergencies.

What we do here, as what we did in *Walker v. Harris, supra,* is not at odds with our decision in *Jefferson v. Taiyo Katun K.K.*, nor the comment that "it must be a rare case where the issue of *unseaworthiness as the proximate cause* of an injury is to be resolved * * * against a shipowner as a matter of law," 5 Cir., 1962, 310 F.2d 582, 583, 1963 AMC 1970, 1971, cert. denied, 1963, 372 U.S. 967, 83 S.Ct. 1091, 10 L.Ed.2d 130. (Emphasis added.) Rare or not, unseaworthiness is not always a fact issue. The seaman-

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[9] As a fact issue, not a justification as a matter of law, this washed out by the finding exonerating Mills of negligence (see note 4, supra).

longshoreman may never get beyond a motion for summary judgment. *McQuiston v. Freighters & Tankers S.S. Co.*, 5 Cir., 1964, 327 F.2d 746, 1964 AMC 1489. On the other hand, in other cases such as *Walker v. Harris, supra,* the trier's finding of unseaworthiness must be reversed as a matter of law. *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 1962, 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798, 1962 AMC 565, neither suggests nor compels a different result. Actually the problem there was the erroneous effort of the Court of Appeals to reconcile apparently conflicting special interrogatories. Here there is no inconsistency. To the contrary, we disregard the finding of seaworthiness[10] because the facts show unseaworthiness as a matter of law.

This leaves only the finding that Mills' injuries "were the result of an unavoidable accident." Its presence is a sharp reminder of the confusion resulting from the importation of this essentially Texas device leading to discountenance of its use in FELA and federally created maritime claims. *Page v. St. Louis S. Ry.*, 5 Cir., 1963, 312 F.2d 84, 93. Of lumping sole proximate cause with unavoidable accident, we said on the second go-round in *Page*:

> "[W]e deem it a matter of good judicial administration to point out now, as we did formerly on unavoidable accident, that ordinarily in FELA cases there is really no place for this issue in the jury submission as such. All of these collateral devices so dear to the heart of Texas bred and Texas trained lawyers immersed in its complex system of special issues sub-

[10] Since liability follows from this judicially declared unseaworthiness, the exculpatory finding of no negligence becomes immaterial.

> mission are in reality merely a submission in another form of questions already implicit in the basic ones of the (a) Railroad's negligence, (b) causation by reason of the Railroad's negligence, (c) the injured worker's negligence, (d) causation by reason of the worker's negligence, and (e) the percentage reduction of damages." *Page v. St. Louis S. Ry.*, 5 Cir., 1965, 349 F.2d 820, 826.

And certainly it was so here. For apart from the general instruction that the happening of an occurrence does not necessarily establish negligence[11] (see Page II, 349 F.2d at 825), the definition of an unavoidable accident as "an * * * event or occurrence, happening suddenly * * * not proximately caused by any unseaworthy condition of the vessel or her appurtenances," served only "to cross examine the jury," Page II, 349 F.2d at 826, as to a matter already submitted in a different form. The pudding's eating proof is that our holding of unseaworthiness as a matter of law automatically destroys the finding of unavoidable accident pursuant to this definitional instruction.

Since the trial Court should have granted Mills' motion for judgment n.o.v. pursuant to Rule 50(b), the cause must therefore be reversed and remanded with directions to enter judgment for Mills.

REVERSED AND REMANDED.

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11 In the charge on unavoidable accident, the Court stated: "The law recognizes that a vessel may be in every respect seaworthy and neither the plaintiff nor the defendant may have been at fault in any respect, and yet an accident may occur."

[Caption Omitted]

Before BROWN and COLEMAN, Circuit Judges, and MORGAN, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and it is hereby remanded to the said District Court with directions to enter judgment for Mills, in accordance with the opinion of this Court;

It is further ordered and adjudged that the appellee, Mitsubishi Shipping Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

March 16, 1966

Issued as Mandate:

[Caption Omitted]

[April 20, 1966]

On Petition for Rehearing

Before BROWN and COLEMAN, Circuit Judges, and MORGAN, District Judge.

PER CURIAM:

It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

APPENDIX "B"

(Comparison of Record and Opinion demonstrating Respondent's Contradictions of Court of Appeals' substitute fact findings.)

OPINION

Although the shipowner seeks to insulate the jury verdict from critical scrutiny by emphasizing the confusion in the testimony of Mills and other non-seagoing witnesses in the description of the winches, its own evidence — and especially the photographs it sponsored and introduced—makes the mechanical setup clear.

RECORD
(All Mills' Testimony)

[By Counsel for Appellee]

Q. Now, I will show you what has been marked as Defendant's Exhibit 3 and 4, and ask you now does that look like the winch and the handles and such that we are talking about?

A. That don't look like the winch I was on.

Q. That does not look like it. How does it differ?

A. The reason why I say it doesn't look like the winch I was on, I don't see the offshore winch.

Q. All right, just a moment. Now, let me ask you to look then at Defendant's Exhibit 5, 6 and 7 and look at the two together and tell us if one looks like the offshore winch and one looks like the inshore winch?

A. I couldn't be for sure that either one of these is the winch that I was

operating. I couldn't be sure. (p. 145)

* * *

Q. One of the winches has the steam handle on one side, and the operating lever on the other. The other one would be just the other way around, isn't that right?

A. That's right, but I couldn't swear this here was the winch at No. 4 hatch, and I couldn't swear this one is the one at the No. 5 hatch.

Q. Look at the big pictures. I am not asking you to tell me that is the same winch you were sitting on, I am asking does that look like the same winch you were sitting on?

A. It kind of resembles it a little bit.

Q. Is it different in any way?

A. Yes, it is.

Q. How?

A. A lot of difference. The winch I was on, it had an iron plate down here on the bottom, and on the left I could see Ernest Gardner's winch, and I don't even see Ernest Gardner's winch to my right. [pp. 145, 146]

* * *

Q. If it doesn't look like it, we will just forget it. But I want to know if the seat looks like what you were sitting on and the seat and the lever and the foot brake looks like it?

MR. NAGLE: I am going to object to counsel testifying what is in the picture when the picture is not in evidence. There is no evidence at all that there is a foot brake or the levers that he is talking about or the valves that he is talking about are in there. I object to his testifying as to what is in the picture before the picture is in evidence. (p. 148)

* * *

MR. MCKINNEY: I would like to offer Defendant's Exhibit 3 and 4 for purposes of illustration only.

MR. NAGLE: So long as it is conditioned that they are illustrations only and not intended to portray the winch accurately that he was working on, we will not object.

THE COURT: Admitted. (pp. 149-150)

* * *

MR. MCKINNEY: The ones already identified are Defendant's 3, 4, 17.

THE COURT: I thought the others had been identified but not offered.

MR. MCKINNEY: No, they were not identified.

MR. NAGLE: Your Honor, without going into them picture by picture, they look like the same pictures. I think they are the same.

MR. MCKINNEY: I now offer Exhibits 11, 12, 13, 14, 15, 16, 8, 9, and 10 in evidence.

THE COURT: They are admitted.

MR. NAGLE: Excuse me, your Honor, I am going to ask that the limitation be placed on those —first of all I would like to object to the introduction of them on the grounds that the photographer who took them is not here. The type of lens which would show a shortening or widening

is not explained. They are illustrative of the winch, and I ask that they be so limited as not representing the winch itself or being true and accurate representations, but being an actual illustration.

THE COURT: Will you modify your offer?

MR. MCKINNEY: I do not understand the testimony to be that way.

THE COURT: I think if you look back, he says it looks like it.

MR. MCKINNEY: You cannot tell what the Japanese will say. I will limit the offer, then.

THE COURT: If you want to make it unlimited, make it on your bill and then offer it limited. I will sustain the objection to the unlimited offer.

MR. MCKINNEY: Then I offer it for the limited purpose of illustration.

THE COURT: Admitted for that limited purpose. (378-380)

* * *

OPINION

The control lever was on the operator's left. This lever was vertical and could be shifted in an arc forward and aft. *The function of the lever was to engage and disengage the gears of the winch to select the direction in which the winch drum was to revolve. At its lower end the lever was of course connected to the gear mechanism.* (emphasis added)

Because there was simply no evidence that the winch was being improperly operated and, indeed, Mills was exonerated from charges of negligence (see note 4, supra), we think the exact sequence of operational steps is not significant. In executing this integrated movement of the

RECORD

MR. MCKINNEY: Let's step over here and show the jury what we are talking about.

Q. Now, let's look first at the one marked 3. Is that seat what you were sitting on?

A. That's right.

Q. Now, this handle that sticks at an angle, is that what you turn the steam on with? Right here, what is that?

A. That a valve.

Q. Is that the steam valve?

A. Yes, sir.

Q. *And this handle right here in the right-hand corner of the picture, what is that?* [Note: The alleged gear lever]

A. *That's your brake.*

Q. You told me you just turned the steam on and you have a brake and that's all?

A. Yes, before you turn your steam on you have to use your brake.

Q. This is how you direct the winch either one way or the other, either to unreel it or reel it in, isn't that what it is?

A. This here is for lowering the cargo off in the hold.

cargo sling through two planes by means of the sequential and sometime simultaneous movement of both winches, the operator of the high-boom winch did several things. To lift and haul the sling up and over the hatch, *the operator, using his right hand, opened the steam valve and with his left hand pushed the gear lever forward. When the load reached the desired height over the hatch, the lever was pulled back and the steam closed off. To lower, apparently the steam remained off and the lever was moved forward. The speed of the descending sling load could be altered by the use of a nearby foot brake or by opening the steam, or both.* (emphasis added)

Q. And you are telling me there is no way that you can turn the handle.
A. You have to turn your steam on.
Q. But that it only goes one way?
A. It goes two ways.
Q. *But it has no power except one way, is that what you are telling me?*
A. *That's right.* (pp. 150-151)

* * *

Q. Now, still looking at Defendant's Exhibit 3 and looking in the lower left, what is that? (Note: alleged foot brake)
A. That's a pipe, a steam pipe.
Q. You are telling me that this right here is a steam pipe?
A. That's right.
Q. Do you know a foot brake when you see it?
A. Sure I do.
Q. And you are telling me this winch had no foot brakes on it?
A. I don't remember a foot brake being on it. (151-152)

* * *

By Mills' Counsel

Q. Are all of the winches the same, exactly the same?

A. No, sir.

Q. Are any two winches that you have ever worked on the same?